Supreme Court, U.S.
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NO. _____

In The

SUPREME COURT

Of The

UNITED STATES

October Term, 1996

Nelson Fernandes,

Petitioner,

- vs -

Rockaway Township Town Council,

Township Engineer,

R.V.R.S.A. & Executive Director,

E.P.A. & Regional Administrator of Region II,

Dorsey and Bell

John Dorsey and Joseph Bell

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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98 pp

QUESTIONS PRESENTED

1. Were EPA's memos and the evidence presented to support summary judgment to enforce a Title VI regulation and equal protection sufficient to support a continuing violation of the regulation and meet EPA's motion for summary judgment.

2. Did the court abuse its discretion on each issue, so this Court can vacate its orders for a de novo review, as a matter of law, in order to decide petitioner's original motion for summary judgment on the violation of regulation and equal protection.

3. Can a federal agency impose a grant condition without stipulating the federal authority so recipients are aware of what Congress expects.

4. Did EPA violate this state's independence and due process by negotiating denials with NJDEP to affect the *judicial* aspect of their review, and by imposing a grant condition that requires *legislative* action to justify denying sewer service in support of a contractual condition.

5. Did Rockaway and RVRSA violate their duty by failing to enforce the Title VI regulation, determine the limits of EPA's authority, and not protecting its inhabitants interests so as to hold them liable for damages even if EPA immunity is not waived.

6. Would this Court like to address any other appropriate question warranted by the facts in this case.

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OPINIONS BELOW

The opinion of the district court is contained in its orders of June 19, 1995 (App.D, p.34) & August 24, 1995 (App.C, p.31).

In both opinions, the court finds the grant condition protects wetlands by denying sewer service. These opinions override a Court of Claims holding that a grant condition by EPA that denies sewer service is a taking (p.18). In effect, the court sanctions EPA's equal protection and due process violation, since the Court of Claims decision precedes EPA's grant condition. The court's opinions also overrides Cape May Greene, a case that found the grant condition violated the CWA.

JURISDICTION

Petition for Rehearing denied (5/13/96). District Court Order Affirmed (3/26/96). District Court's Order on summary judgment (8/24/95). Order on Reconsideration (6/19/95). Order Dismissing Case (5/11/95). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (Review Circuit Ct. decision).

STATUTORY PROVISIONS INVOLVED

REGULATION IMPOSED ON RECIPIENTS

40 CFR Ch. I, Subpart F, §30.600 (E) "Civil rights act. you must comply with section 602, title VI of the civil rights act of 1964. (42 U.S.C. 2000d) and related nondiscrimination laws and executive order 11246. **These authorities prohibit you from excluding any person from participating in, denying them the benefits of, or** discriminating against them on the basis of race, color, or national origin under **any program or activity involving federal financial assistance.**" (emphasis added)

CONDITION THAT CONFLICTS WITH REGULATION

Assistance I.D. No. C340389-04 amendment no. 1 (4.b.)" **The grantee agrees that for a period of 50 years from November 29, 1983, no sewer hook-up or other connection to the sewage treatment facilities included in the scope of this grant will be allowed or permitted so as to allow the discharge of wastewater from any building, facility or other construction on any parcel of land, as delineated on the maps cited in (a) above, that is within any wetlands** or within the 100 year floodplain, which land parcel as of November 29, 1983 was undeveloped (i.e., upon which no building, facility or other construction has been erected or placed) unless approved in writing by the Regional Administrator."

ROCKAWAY DOES NOT RELY ON FEDERAL LAW

Rockaway's Ord. § 54-100 L. (in support of grant condition)

"Wetlands. The connection of any structure, to the Rockaway Valley Regional Sewer Authority sewer system, on lands classified as wetlands is prohibited **unless a waiver is granted by said Authority**. For the purpose of administering this provision wetlands are delineated on a set of municipal tax maps available for inspection at the office of the Township Engineer. Any lands designated as wetlands may be counted as part of a tract acreage for the purpose of computing the maximum density permitted in the zone in which it is located."

42 U.S.C. 2000d-2

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40 CFR Ch. I, Subpart F, §35.925-13 (E)

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STATEMENT OF THE CASE

The RVRSA accepted a contract condition from the EPA that prohibits them from allowing owners of wetland lots to connect to the sewer system. As a result of this contract condition, EPA, RVRSA, and Rockaway violates the CWA and a Title VI regulation that requires them to provide sewer service to any beneficiary. To obtain relief, petitioner was required to seek a waiver from NJDEP and EPA. That waiver was denied based on EPA's policy to deny due process and equal protection.

The EPA filed a prediscovery motion to dismiss based on the statute of limitations and sovereign immunity. Petitioner filed a cross-motion to enforce Title VI and equal protection.

The district court failed to consider petitioner's continuing violation theory to find limitations had run. The court later granted EPA summary judgment on its denial of a waiver, thus reaching the merits. The district court failed to consider facts, theories and case law. Its decisions conflict with Supreme Court, Court of Claims, and Circuit Court decisions on the issues. The court shows a partiality toward the defendants that is prejudicial.

APPELLATE REVIEW - The Third Circuit affirmed the district court's decision and declined to grant petitioner a rehearing en banc. The panel was asked to consider rehearing, but declined. The Third Circuit abused it discretion by affirming a decision that would override decisions of this Court and other Circuits, and by not reviewing de nova; applicability of statute of limitations, Ind. Con. Corp. v. US Bur. of Rec., 15 F.3d 963, 967, summary judgment ruling, G.D. v. West. Sch. Dist., 930 F.2d 942, 946, the evidence, Jibson v. Mich. Ed. Assoc., 30 F.3d 723, 729 and jurisdictional questions. Adams v. Trust., NJ BR. TR., 29 F.3d 863, 869. The Court's affirmation also sanctions a departure by the lower court that requires this Court exercise its supervisory power.

REASONS FOR GRANTING THE PETITION

I - STATUTE OF LIMITATIONS ERROR

SUMMARY - The district court abused it discretion by not considering facts [1] that prove a continuing violation, and by not deciding the continuing violation argument. [2] The court's decision also conflicts with rulings by this Court and other Circuits.

FACTS - The court abused its discretion by not considering facts in briefs on summary judgment as binding judicial admissions. City Nat. Bank v. U.S., 907 F.2d 536, 544 (5th. Cir.1990). Regulation 40 CFR Ch.I, Sub.F, §30.600(E) is violated on it face by the terms of grant condition 4(b), which is rendered void by **"failure to comply with regulations is a fatal flaw to administrative action."** Vitarelli v. Seaton, 359 U.S. 535, 539 (1959). Petitioner being denied the benefit of his assessment by a condition that bars compliance with regulation (App.F, p.39). Cape May Greene, a case argued by both sides, held a grant condition to deny sewer service violates the CWA. The court was arbitrary and irrational by disregarding facts on a violation of regulation, as it applies to a tolling doctrine. West v. Phil. Elec. Co., supra. The court's handling of the grant condition conflicts with a ruling by this Court. [3]

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[1] Abuse of discretion means serious error of judgment, such as, relying on forbidden factor or failure to consider an essential factor. Kasper v. Bd. of El. Com., City of Chicago, 814 F.2d 332, 339 (1987).

[2] Review jurisdictional questions and court's interpretation of tolling doctrine. Adams v. Trust., NJ BR. TR., 29 F.3d 863, 869.

[3] The "injury in fact" in an equal protection case of this variety is the **denial of equal treatment resulting from the imposition of the barrier**, not the ultimate inability to obtain the benefit." Fla. Gen. Contractors v. Jacksonville, 124 L.Ed 2d 586, 597.

CONTINUING VIOLATION - The court also disregarded memos that show the grant condition is based on contract, thus unable to prevent enforcement of the regulation (pages 23 & 24) (App.K&L).[4] Those memos prove a continuing violation of regulation. The court abused it discretion by not considering the memos, violation of regulation, holdings of Cape May Greene, and by not ruling on the continuing violation theory,[5] thus denying petitioner a substantial right.[6]

Not considering a continuing violation conflicts with the following cases. Continuing violation theory applied in contract matter. Merchants & Marine Bank v. Douglas-Guardian Corp., 801 F.2d 742 (5th.Cir.1986). **"Wooden application of . .** (limitations), **which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act."** Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-381 (1981). **"One should not be allowed to acquire a right to continue the tortious conduct. It follows logically that statutes of limitation should not run prior to its cessation."** Page v. U.S., 729 F.2d 818, 821-822 (2nd.Cir. 1984). Policy contrary to law was subject to review even after limitations ran. Public Citizen v. Nuc. Reg. Com'n, 901 F.2d 147, 152-153 (D.C.Cir. 1990).

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[4] Documentary exhibits would constitute matrices of opinion in lieu of findings of fact. WOFAC Corp. v US, 269 F.Supp. 654 (1967).

[5] Dent v. Cunningham, 786 F.2d 173, 175 (application of legal precepts); Gibney v. Toledo Bd. of Ed., 596 N.E.2d 591, 598 (refusal to decide an issue is an "abuse of discretion").

[6] District court abuses its discretion when action taken is improvident and affected substantial rights of the parties. Goetz v. Crosson, 41 F.3d 800.

LIMITATIONS BEGINS when an agency review is final, even though the initial challenging period is over. Crown Coat Front Co. v. U.S., 386 U.S. 503, 511-512 (1966); Wind River Min. Corp. v. U.S., 946 F.2d 710, 716 (9th.Cir.1991); Impro Products, Inc. v. Block, 722 F.2d 845, 850 (D.C.Cir.1983); White v. Secretary of Army, 629 F.Supp.64, 68 (D.C.Cir.1984). The court's holding that the statute began to run with the imposition of the grant condition overrides these authorities. Hence, EPA's final agency action on May 5, 1989 (date of EPA review required by grant condition 4.b.,p.2) (App.H,p.42) makes petitioner's action filed on Jan. 27, 1994 timely in accordance with 28 U.S.C. 2401(a). Petitioner was never notified of the condition, having bought the land after it was imposed. So, he was not materially affected until the grant waiver was denied. Therefore, the district court's decision also conflicts with Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1966) (controversy is ripe when agency action materially impacts challenging party).

The RVRSA and its municipal members violated Title VI by accepting an arbitrary grant condition contrary to a duty not to violate the regulation, to keep the EPA from overstepping its lawful authority, [7] and to protect its inhabitants interests in their capacity as trustees for the public.[8] Therefore, they are separately liable for their violations of duty irrespective of EPA's immunity.

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[7] "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority. "Federal Crop Ins. Corp v. Merrill, 332 U.S. 380, 384 (1947).

II - TITLE VI JURISDICTION ERROR

SUMMARY - The court made a legal error as to Guardians, and overrides other cases that hold petitioner to be a third party beneficiary to the grant. The court also failed to review the regulation to determine its jurisdictional requirements.

TITLE VI JURISDICTION - Petitioner, as the owner, paid an assessment entitling him to sewer service [9] (App.F,p.39). EPA imposed a condition that led the RVRSA to deny sewer service, in violation of a regulation to provide it (App.H,p.41). **"Violation of the . regulations required a reversal of the denial of benefits."** Matthews v. Rail. Ret. Bd., 472 F.2d 1176 (5th.Cir.1973). EPA knew the Court of Claims held a denial of service by EPA to be a taking, making their condition a deliberate denial of equal protection. In support of his Title VI argument, petitioner argued Guardians. That Court found a recipient could be **"administering the program in violation of the statute or regulations."** Guardians @ 598. That Court preferred enforcement of the regulation, which it found to be separate from the statute:

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[8] "A municipality, at least as to contracts to which it is a party, occupies the position of a ***trustee*** for its inhabitants, and "it is its plain duty to protect the rights of [its] inhabitants * * *, the public, the community * * *." Boonton Mayor, etc. v. Boonton Water Co., 69 N.J. Eq. 23, 24 (Ch. 1905), aff'd 70 N.J. Eq. 692 (E. & A. 1906). We see no reason why this "plain duty" should not extend to protect all the public rights of the residents of the municipality." State of New Jersey v. East Shores, Inc., 194 N.J. Super. at 537

[9] "An assessment is imposed for an improvement specially beneficial to the individual property assessed and can only be justified when proportioned to such benefits. **Absence of benefit precludes assessment**. Maywood Land Co. v. Rochelle Park, 13 N.J.Misc. 842.

> "Thus, a majority of the Court would hold that **proof of discriminatory effect suffices to establish liability only when the suit is brought to enforce the regulations rather than the statute itself."** Guardians Ass'n. v. Civil Service Comm'n. N.Y.C., 463 U.S. 582, 608 n. 1 (1982); Cannon v. Univ. of Chicago, 441 U.S. 677, 722, 99 S.Ct. 1946, 1970, 60 L.Ed.2d 560 (1979). (emphasis added)

This holding creates a private right of action to enforce a regulation by those adversely affected by its arbitrary administration. The 7th. Circuit in conformance with Guardians, accepted the jurisdiction contained in a regulation, but dismissed a statutory claim when its requirements were not met. Gomez v. Ill. St. Bd. of Ed., 811 F 2d. 1030, 1044-1045 (7th.Cir.1987). So, the district court made a legal error regarding Guardians and also overrode Gomez. It used the statute's requirements to bar enforcement of a regulation, instead of looking to the regulation, which represents an improper application of law to fact. Valenti v. Mitchell, 962 F.2d 288, 299 (3d.Cir. 1992). The district court also disregards factors that should be given great weight, thus abusing its discretion. U.S. v. Kramer, supra.

The court's jurisdictional bar also conflicts with decisions that make petitioner a third party beneficiary. [10] Hence, the court denies petitioner his entitled review, and also denies him the protection of a regulation having the force of law. U. S. v. Nixon, 418 U.S. 683, 695 (1974).

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[10] **"Private parties function as third-party beneficiaries to these [Title VI] contracts."** Guardians at 633; Lau v. Nichols, 414 U.S. 563, 571n.2 (1974); Soberal- Perez v. Heckler, 717 F.2d 36, 39 (1983).

BASIS FOR ENFORCING THE REGULATION - 40

CFR Ch. I, Subpart F, §30.600 (E) is clear:

> **These authorities prohibit you from excluding any person from participating in, denying them the benefits of . . . any program or activity involving federal financial assistance."** (emphasis added)

The regulation interprets the CWA and Title VI as not denying the benefit to any person. Abbott Labs. v. Gardner, 387 U.S. 136, 152 (1966) (regulations interpret statutory provisions). Mr. Hargrove's memo proves he relied on contract, not federal law, **". . they can also enter into contracts with the EPA through grant agreements. These contracts stand on the same footing as contracts between natural persons or municipalities"** (App.K,p.47). By prescribing a denial of due process, Mr. Sullivan proves he had no authority. (App.L, p.57). EPA admits RVRSA accepted its grant condition in their facts not in dispute. Grant conditions must be unambiguously imposed by Congress. Pennhurst St. Sch v. Halderman, 451 U.S. 1, 17 (1980). RVRSA violated its duty to Title VI by accepting and carrying out a condition that remains vague as to Congress' intent, thus remaining a contract condition that cannot preempt the duty to comply with regulation. Chapman v. Houston Welf. Rights Org., 441 U.S. 600, 99 S.Ct. 1905 (Federal rights limited to statute, regulation and treaty). The court abused its discretion by failing to consider these memos, as they apply RVRSA's duty and the grant condition as a barrier to equal protection, Fla. Gen. Cont., supra.

The regulation identifies "any person" as a beneficiary. The Supreme Court held all beneficiaries to be third parties to Title VI grants. A more limited reading of the regulation is contrary to the holding and Congress' intent for this regulation:

> "As to each assisted program or activity, ***title VI will require an identification of those persons whom Congress regarded as participants and beneficiaries,*** **and in respect to whom the principle declared in title VI would apply."** 110 Cong. Rec. 1521. Carmi v. Metro. St. Louis Sewer Dist., 620 F.2d 672, 675 n.4 (1980); Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226, 1236 n.17 (1980). (emphasis added)

By denying a Title VI review, the court allows the Regional Administrator's grant condition to prevent enforcement of the regulation that defines his duty and petitioner's rights as a beneficiary. US v. Shimer, 367 U.S. 374, 377 (regulations define an administrator's duty). The Regional Administrator for Region II relies on a grant condition to obviate his duty, but that condition is in violation of the regulation, making that contract condition unenforceable. Burt v. Union Cent. L. Ins. Co., 187 U.S. 362, 23 S Ct 139. Denial of sewer service is also considered a taking. Unpublished Case, 220 Ct. Cl. 605, 611 (4/6/79). The proposition that emerges is that the EPA takes private property to preserve wetlands without paying compensation, though contrary to the CWA and regulation. EPA's grant condition is contrary to regulation, making it is illegal and of no affect. Vitarelli v. Seaton, 359 U.S. 535, 539 (1959); U.S. v. Nixon, 418 U.S. 683, 695-6 (1974); Service v. Dulles, 354 U.S. 363, 372-73 (1957).

III - WAIVER OF SOVEREIGN IMMUNITY

SUMMARY and ARGUMENT - The district court reviewed petitioner's brief for a waiver of immunity. It reviewed and rejected some, but not all, proving the remainder of the waivers were not considered, which is "arbitrary and irrational." West v. Phil. Elec. Co., 45 F.3d 744, 752 (3rd. Cir. 1995). Overlooking arguments that included the CWA waiver resulted in a jurisdictional bar on technical grounds, thus affecting the outcome and a substantial right. Lockhart v. West. Credit Corp., 879 F.2d 43, 53, 59 (3d Cir.1989). It results in an "abuse of discretion" by failing to consider an essential factor. Kasper v. Bd. of El. Com., supra..

WAIVER OF IMMUNITY IN CWA - Failure to consider the CWA waiver, in effect, overrides this Court's finding a waiver to exist in the CWA (Clean Water Act), which the EPA alleges to be the source of its authority. U.S. Dept. of Energy v. Ohio, 503 U.S. 607, 617-621 (1992). Petitioner's Title VI action is against the Reg. Admin. for Region II, RVRSA and Rockaway. Idaho Cons. League, Inc. v. Russell, 946 F.2d 717, 719 (9th.Cir. 1991). The waiver in the citizens suit section allows a civil action in a district court, and 33 U.S.C. §1365(e) does not restrict an action under another statue:

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek . . any other **relief** (including **relief against the Administrator** or a State Agency)."

Three things are clear. First, the word "relief" includes damages. Franklin v. Gwinnett Cnty. Pub. Schs., 112 S.Ct. 1028, 1034-1035 (1992). Section 1365(2) also provides for damages in the phrase **"amount in controversy."** Wabash Ry. Co. v. Vanlandingham, 53 F.2d 51, 51; Howard Iron Works v. Buffalo Elevating Co., 81 N.Y.S. 452, 459. Second, Congress named the Administrator in his official capacity, which is **"another way of pleading an action against [the governmental] entity of which an officer is an agent."** Kentucky v. Graham, 473 U.S. 159, 165 (1985) (quoting Monell v. N.Y.C. Dept. of Soc. Svc., 436 U.S. 658, 690 n.55 (1978). See; Hafer v. Melo, 112 S.Ct. 358, 361 (1991). Third, 505(e) provides **"relief against the Administrator"** under any statute, which makes a review under 42 U.S.C.§2000d-2 appropriate, based on:

> "[A]ny department or agency action . . . shall be subject to such judicial review *as may otherwise be provided by law* for similar action taken by such department or agency on other grounds."

Title VI provides a review and preserves the right to a judicial review provided by other laws without having to file that action. Gardner v. St. of Al., Dept. of Pensions & Security, 385 F.2d 804 (1967). The EPA disregards Cape May Greene and the Ct. of Claims holding, and the principle that violating a regulation renders the condition void. It allows a condition based on contract to prevent enforcing a regulation. After complying with Cape May Greene by abandoning the practice in that case, they resurrect it for the RVRSA, thus keeping the grant condition

from being moot. Dermott Sp. Sch. Dist. of Chicot Cnty. v. Gardner, 278 F.Supp. 687 (1968). Title VI is concerned with limiting arbitrary agency power, thus it applies here. Alabama NAACP St. Conf. v. Wallace, 269 F.Supp. 346, 351-52 (1967). EPA's violation of regulation and equal protection requires a review under 2000d-2. Salvador v. Bennett, 800 F.2d 97, 99 (7th.Cir.1986). If petitioner's misapprehends the law or his complaint is deficient, he humbly asks the Court to remand with leave to amend, since the facts supporting a Title VI violation also prove a CWA violation, thus providing colorable grounds for relief. Hahn v. U.S., 757 F.2d 581, 587 (3d Cir.1985); Williams v. Little Rock Wat. Wks, 21 F.3d 218 (8th.Cir.1994).

EPA's VIOLATION OF CWA - Setting effluent standards is not discretionary. Scott v. City of Hammond, Ind., 741 F.2d 992, 997 (1984). Instead of maintaining the effluent standard, the Administrator imposed a grant condition in violation of regulation and equal protection to deny it. This violates the CWA, Cape May Greene, just as it violates the regulation, U.S. v. Nixon; Vitarelli v. Seaton, supra., which violates 33 U.S.C. 1365(a)(2). Greene v. Costle, 577 F.Supp. 1225, 1232 (1983). The Administrator deliberately abdicated his statutory duty. U.S. v. City of Det., 720 F.2d at 451 (1983).

The Administrator has the authority to require pretreatment of toxic effluents that are discharged into publicly owned treatment works. 33 U.S.C. §1317. This authority allows him to issue an order against violators that is subject to a Presidential review. However, no distinction exists between the sewage

generated by homes on wetland lots, versus regular lots, to warrant a denial of service under this statute. Furthermore, using a grant condition instead of an order overreaches his authority by avoiding the order that would trigger a Presidential review. This violation further supports Cape May Greene and proves EPA has no authority under the CWA to deny sewer service, as claimed.

These facts supports the following inference. The preceding review shows that wetland lots are not one of the class covered by this statute since they cannot discharge pollutants into publicly owned treatment works. Furthermore, the class exists for the sole purpose of denying service to prevent construction. Nor does the statute provide authority to use a grant condition to further its goals. To the contrary, it requires an order that is subject to a Presidential review to avoid arbitrary conduct. In order to circumvent this limitation, Mr. Hargrove developed a concept based on contract that is arbitrary and also violates the safeguard built into the statute, so as to disguise illegal conduct in order to take property while avoiding damages and discovery.

EPA then involved the RVRSA by using terms that force compliance with the law to aid in its violation. Besides, a Title VI action could be defeated by arguing that the denial of service is not racial, resulting in a district court relying on the statute instead of the regulation, as in this case. It is scary to see how easy it was for two people to violate the law and involve other agencies in that violation, causing petitioner a great deal of time, money and twelve years of continuing aggravation.

IV - SUMMARY JUDGMENT

SUMMARY - The district court abused its discretion by treating clarification as though it were reconsideration, and by not considering essential factors. Kasper v. Bd. of El. Com., supra.

THE CASE WAS OVER - EPA was granted its primary relief, but moved for clarification on its alternative relief. The district court abused its discretion by granting reconsideration when only clarification was requested. Gillette Tire Jobbers v. App. Ind., Inc., 596 F.Supp. 1277 This conflicts with a Circuit holding that **"clarification does not change . . but merely restates . ."** Mikel v. Gourley, 951 F.2d 166, 169 (8th. Cir.1991). The court also overrides the principle that once a case ends that no further changes can be made. Mallory v. Eyrich, 922 F.2d 1273, 1282 (6th.Cir.1991). The court filed its appealable order denying petitioner's motion for reconsideration on June 19, 1995 in accordance with Rule 79(b), thus ending the motion. The Appellate Court docketed the case on June 28, 1995 in accordance with Rule 4.(a)(1), as final. Therefore, the order of Aug. 24, 1995 was based on EPA's motion for clarification (App.C, p.31). The court "sua sponte" converted a motion for clarification to reconsideration, thus denying petitioner notice and the chance to defend. Gioia v. Blue Cross Hosp. Svc. Inc. of Mo., 641 F.2d 540, 542 (1981). Both court opinions hold the grant condition protects wetlands in support of EPA's denial of sewer service. However, those opinions conflict with a Court of Claims holding that a denial of sewer service represents a taking. Unpublished Case, 220 Ct. Cl. 605, 611 (4/6/79).

APA REVIEW- The court disregarded essential facts, Kasper v. Bd. of El. Com., supra., by disregarding evidence contrary to an evidentiary standard that would apply at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

The court disregarded two memos (App.K,p.48), (App.L, p.57). One shows the grant condition is based on contract, which is arbitrary. Antilles Ind., Inc. v. Gov. of Vir. Isl., 388 F.Supp. 315, 321. The other prescribed negotiating with the state to deny due process on waiver requests, proving unconstitutional agency action that violates the APA. Doe v. U.S.C.S.C., 483 F.Supp. 539 (D.C.N.Y.1980). These memos contain material facts that affects the court's APA review, that were not considered.

Petitioner presented the court with the fact that regulation 40 CFR Ch. I, Subpart F, §30.600(E. is violated on its face by the grant condition 4.(b. The court abused its discretion by disregarding it, since the regulation would render the condition void since **"failure to comply with regulations is a fatal flaw to administrative action."** Vitarelli v. Seaton, 359 U.S. 535, 539 (1959); Kelly v. Railroad Retire. Bd., 625 F.2d 486, 492.

Even if EPA's immunity is not waived, those memos prove they went beyond violating a regulation, just as a comparison of the condition and regulation shows the condition to be the sole obstacle to enforcing the regulation. Their conduct proves a denial of due process and equal treatment. It proves, RVRSA and Rockaway's liability for violating a Title VI regulation and by failing to keep the EPA from overstepping its lawful authority. Federal Crop Ins. Corp v. Merrill, 332 U.S. 380, 384 (1947),

EPA's DELIBERATE VIOLATION - The EPA claimed two cases supported its right to impose a grant condition. Cape May Greene, Inc. v. Warren, 698 F.2d 179 (3rd.Cir.1983), and Shanty Town Assoc. Ltd. Part. v. E.P.A., 843 F.2d 782 (4th. Cir.1988). EPA admits it lacks authority to regulate sewer service directly. Shanty Town, supra.@ 789. The EPA implies indirect authority. Ordinarily pre-emption may be implied.[11] However, there is one notable exception that the court overrides, **"[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously"**. Pennhurst State School & Hospital v. Halderman, 451 U.S. at 17. The EPA makes a general reference to the CWA. However, they fail to present a specific section that meets that requirement. Whereas, the regulation that extends Title VI protection to petitioner, underwent a rigorous review. [12] Hence, the regulation has the force of law. U.S. v. Nixon, 418 U.S. 683, 695 (1974).

The court gave no weight to Cape May Greene finding the grant condition violates the CWA, **"It is also clear that EPA is using its power to regulate grants under the Clean Water Act to accomplish matters not included in that statute"** and **"EPA's ban was not directed at the operator of the sewage plant or its appurtenances, but rather to customers who would be serviced by the plant -- people who are not directly subject to**

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11 Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

12 "Title VI enforcement regulations **incorporating a disparate-impact standard** had been drafted by a **Presidential task force** and the **Justice Department**, and **every Cabinet Department** and about **40 federal agencies** had adopted standards **in which Title VI was interpreted** to bar programs with a discriminatory impact." Alexander v. Choate, 469 U.S. 287, 295 n.11; Guardians, supra., at 592, n.13.

EPA authority." Before deciding, the Court quoted EPA: **"EPA is not the empowered agency with jurisdiction to change, enforce or control local land use."** and **"A sewer hookup ban as a condition to the grant would, we believe, be neither appropriate nor effective,"** *id. at* 182. These admissions show EPA was aware of its limitations, but chose to overreach its authority.

If it were to stand, the court's order would override a ruling on a taking: **"EPA has appropriated . . . contractual rights to sewage services"** and **"imposed . . regulatory burden on the use of plaintiff's property"** as well as **"prevented . . the sanitary agency . . . from providing additional sewage treatment services, either now or in the future, that may be needed to enable the fulfillment of their contractual obligation under the sanitary district agreement."** Unpublished Case, 220 Ct. Cl. 605, 611(4/6/79). Furthermore, the CWA does not prescribe taking property to accomplish its goals. EPA's violation of equal protection, statute, and regulation forecloses a taking claim. Florida Rock Ind., Inc. v. U.S., 791 F.2d 893, 898 (Fed.Cir.1986). The only way to restore those injured is damages.

The Court of Claims decision was rendered six weeks before EPA imposed its grant condition in Cape May, so it had the opportunity to desist. (App.L,p.57). The EPA's denial of service led to the Cape May Greene decision on other grounds, giving it a second chance to desist. This Court is the third to address the denial of sewer service, but the first on the grounds that it violates Title VI and equal protection.

These facts support the inference that the EPA disregards its limitations and judicial holdings to achieve goals caused by internal pressures (App.L, p.52). The EPA looses nothing by violating a court's holdings and trammeling our rights in the process since they rely on sovereign immunity. Hence, the EPA did not foresee any liability for damaging petitioner and his class.

CONSTITUTIONAL VIOLATION - EPA violated equal protection to take wetland lots by disregarding the Court of Claims holding. [13] By negotiating a denial of due process with this state and compelling a violation of regulation with its grant condition, it used state action to conceal its denial of due process and equal protection. (App.L, p.57). Had the RVRSA and Rockaway adhered to the duty in the regulation, the duty of determining the limits of EPA's authority, and protecting the interests of its inhabitants, then there would be no violation. Disregarding these duties makes them liable. The court's decision would override law on their duty, if the RVRSA and Rockaway are not held liable for their breach of duty.

The preceding supports the following inference. The EPA disguised its taking to avoid compensation by negotiating a denial of due process with the state. It also violated a regulation proving it had no legitimate reason for the taking in the first place. Whereas, the RVRSA (including its municipal members) were so concerned with loosing the grant that it disregarded several different and distinct duties to the public.

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13 Equal protection violation implies that the decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on an identifiable group. Shango v. Jurich, 681 F.2d 1091, 1104 (1982). Cited in David v. Lane, 839 F.2d 1265, 1271-72 (1988).

The district court gave no weight to EPA's admitted violation of due process by negotiating denials of waiver requests (App.L, p.57). NJDEP having recommended denial of a waiver after petitioner was granted an exemption to N.J.'s Wetlands Act. The NJDEP's recommendation to deny sewer service was arbitrary and capricious since it violates the principles in Title VI.

The foregoing supports the inference that the EPA negotiated a denial of due process with the NJDEP to create the appearance of state action, in order to conceal its taking. A consensus involving the EPA, NJDEP and RVRSA also creates a front which causes a court to not seriously consider the allegations of individuals. Or, upon recognizing the injury done by a federal, state, and local agency that a court would rather abuse its discretion rather than have those violations made public.

The court overlooked EPA's denial of equal protection, [14] which conflicts with a holding of this Court. The court overrides law that applies to EPA's denial of this state's independence.[15]

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[14] The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." Fla. Gen. Contractors v Jacksonville, 124 L.Ed 2d 586, 597.

[15] "the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States--**independence in their legislative** and **independence in their judicial departments**. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. **Any interference with either,** except as thus permitted **is an invasion of the authority of the State and, to that extent, a denial of its independence.**" Erie R. Co. v. Tomkins, 304 U.S. 64 (1937).

First, by negotiating a denial of due process with the NJDEP. Second, causing the municipal members of the RVRSA to legislate a local ordinance to justify the denial of sewer service, since they are prohibited from acting in support of a contract condition. [16] So, Rockaway's Ordinance § 54-100 L violates equal protection, case law, and a state statute. [17] The fact that the ordinance does not rely on federal law supports the inference that RVRSA and Rockaway knew that no federal authority existed. .

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16 "Zoning is an exercise of the police power to serve the common good and general welfare. It is elementary that the **legislative function** may not be surrendered **or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts."** Collins v. Board of Adjustment of Margate City, 3 N.J. 200, (1949); Speakman v. Mayor and Council of North Plainfield, 8 N.J. 250 (1951).

17 **N.J.S.A. 40:48-2**: "Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws **not contrary to the laws of this state or of the United States**, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants , and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law." (emphasis added)

V - UNLAWFUL GRANT CONDITIONS

SUMMARY and ARGUMENT - The court reached the merits, since an APA review can address unconstitutional conduct, Doe v. U.S.C.S.C., 483 F.Supp. 539 (D.C.N.Y. 1980), and violations of regulation, Vitarelli v. Seaton, 359 U.S. 535, 539. Hence, this Court can address the issues.

EPA's grant classification of wetland lot owners violates equal protection. [18] That classification is arbitrary since the grant condition advances unlawful goals contrary to this Court's holdings, in four ways.[19] First, the condition violates the regulation, though the regulation preempts the condition, Chapman v. Houston Welf. Rights Org., supra. Second, taking private property in the guise of regulation. Unpublished Case, 220 Ct. Cl. 605, 611(4/6/79). Third, Cape May Greene found the grant condition violated the CWA before it was imposed on RVRSA. Fourth, by negotiating a denial of due process with the state, the EPA intentionally discriminates against wetland lot owners. Therefore, the court's decision conflicts with a principle that applies to grant conditions.

EPA memos that were before the court show the EPA grant condition was arbitrary from the onset, but took a turn for the worse when they deliberately violated due process. These memos, reviewed in more detail in the next argument, show how easy it is for a federal agency to violate the public's rights as compared to what the legal process demands to prove these violations.

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18 Harris v. McRae, 100 S.Ct. 2671, 2691 (1980).

19 Chas. Steward Mach. Co.v. Davis, 301 U.S. at 593.

VI - ESSENTIAL FACTS NOT CONSIDERED

SUMMARY and ARGUMENT- The court abused it discretion by not considering essential facts. [20] Kasper v. Bd. of El. Com., supra. Two of the 24 exhibits supporting Mr. Hargrove's certification represent the underpinnings of EPA's grant condition that meets the evidentiary standards that apply at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252.

Mr. Hargrove's certifies a federal mandate prompted the grant condition. That claim violates FRCP 56(g) as being in bad faith, since his 1979 memo fails to cite any federal authority to support his certification. His memo relies entirely on contract, thus proving his certification false and his condition arbitrary.[21] It also contains proof of a Title VI and equal protection violation in the phrase, **"The question of allowing hook-ups rests with both the authority and the municipalities."** (App.K,p.47). Mr. Sullivan, to whom that memo was directed, violated due process in support of that condition by negotiating with state agencies to have them deny grant waiver requests (App.L,p.57). Therefore, EPA's defense is frivolous by claiming authority under the CWA, contrary to their own evidence.

The court failed to consider essential facts by not reviewing the evidence that supported summary judgment. [22] The court overlooked material facts for trial, grounds to support a continuing violation theory, proof of a violation of regulation, and grounds for summary judgment in petitioner's favor.

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[20] Documentary exhibits would constitute matrices of opinion in lieu of findings of fact. WOFAC Corp. v US. 269 F.Supp. 654 (1967).

[21] 'Administrative action is deemed **"arbitrary"** if it is taken without **any authority of law or upon a misconstruction of the statutory authority** under which it purports to be taken. Antilles Ind., Inc. v. Gov. of Vir. Isl., 388 F.Supp. 315, 321, (D.C.Vir.Isl.)

[22] Pettinaro Const. Co. v. Del.Auth. Reg. Tr., 500 F.Supp. 559.

These facts support the inference that Mr. Sullivan conceals the arbitrary grant condition by involving the state in a denial of due process to make it appear that EPA was cooperating with the state, which might prevent closer examination of Mr. Hargrove's condition. If Mr. Sullivan were proceeding under preemptive federal authority, there would be no need to involve the state, or deny due process in the first place.

Mr. Hargrove perjures himself to mislead the court, by making it appear that he had legal justification for the condition he concocted (App. M, p59). Mr. Sullivan's memo shows the arbitrary grant condition was used in Cape May's grant, proving it to be the same condition in Cape May Greene, the case that found the grant condition violated the CWA. A case the court disregarded. The court also overlooked Mr. Sullivan's unconstitutional denial of due process. Doe v. U.S.C.S.C., 483 F.Supp. 539 (D.C.N.Y.1980). The EPA's conduct proves a wanton disregard of public rights. A Third Circuit holding on "wanton disregard" is suited to the EPA's conduct. [23] The EPA's reliance on immunity proves an indifference to consequences.

I respectfully submit that the court's failure to consider evidentiary facts that are admissible at trial is arbitrary and irrational. West v. Phil. Elec. Co.,supra. By so doing, the court denied petitioner substantive due process.

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[23] Third Circuit holds "wanton misconduct" to be the intentional doing of an act of unreasonal character, in disregard of a risk to actor or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow, and is usually accompanied by a conscious indifference to consequences. Thompson v. Pa. Power Co., 402 F.2d 88, 91.

VI - ROCKAWAY'S FRAUD ON THE COURT

SUMMARY and ARGUMENT - The district court did not consider all the facts that prove Mr. Bell committed a fraud upon a state court. Kasper v. Bd. of El. Com., supra. Mr. Bell having concealed facts from petitioner that would toll limitations, in order to obtain a statute of limitations dismissal. The court realized that Mr. Bell admitted the town's fraud, but failed to realize these facts show he lied earlier to a different judge. Valenti v. Mitchell, 962 F.2d 288, 299 (3d.Cir. 1992) (erroneous finding of fact, errant conclusion of law). The district court held that plaintiff's claim was dismissed by the doctrine of collateral estoppel in its bench opinion. That decision overrides a Supreme Court ruling that fraud destroys the validity of everything into which it enters. It affects fatally even the most solemn judgments and decrees. Nudd v. Burrows, 91 U.S. 426, 440 (1875); Diehl v. U.S., 438 F.2d 705, 709 (1971).

FRAUD BARS RES JUDICATA - Mr. Bell, the Township attorney, represented Rockaway and stated the following in his brief to Judge Harper, "**The Township of Rockaway was prepared to grant an endorsement of his request *when said restriction was brought to the Municipal Attorney's attention by the Municipal Engineer.***" (App.J1,p.45). Mr. Bell states the Council was unaware of the grant condition's existence until he informed them of it, after the engineer told him. This is refuted by his admission in a different brief, "**Mr. Fernandes admits, by his own affidavit, that he knew of the EPA Grant Condition (and the Township's concealment of same and decision to sell despite it).**" (App.J2,p.45). The district court found Mr. Bell admitted the Council's fraud and knowledge of the condition.

The court failed to realize this statement shows he lied before, since he could not inform the Council of the grant condition since they knew about it. During oral argument, Mr. Bell blurts out, **"That doesn't mean we didn't,"** when the judge stated **"But he didn't know, he thought it** [grant condition] **came on after he got the property"** (App.J3,p.45). By using "we," it shows that he knew the grant condition existed well before his earlier statement. How then, could the engineer inform him of the grant condition, when Mr. Bell admits knowing about it, the town's knowledge of it, and the town's fraud ? The district court would be correct on collateral estoppel if Mr. Bell merely admitted the town's fraud. However, his admission shows he lied to the first judge, proving he committed a fraud.

Mr. Bell's admission of a fraud is admissible against Rockaway. Purgess v. Sharrock, 33 F.3d 134, 144 (2d.Cir. 1994); U.S. v. McKeon, 738 F.2d 26 (2d.Cir.1984). Therefore, it can be used to bar Rockaway's res judicata defense in this case, while holding Mr. Bell liable for a fraud that concealed grounds for tolling limitations in the former case. Mr. Bell affected the outcome of the first hearing by lying, which controlled the second hearing. Lockhart v. West. Credit Corp., 879 F.2d 43, 53, 59 (3rd Cir.1989). Mr. Bell fraudulently concealed and misrepresented facts to gain a jurisdictional bar. Isreal Aircraft Industries v. Standard Precision, 72 F.R.D. 456, 463 (1976).

Council knew about the grant condition since December 1984, when, in support of it, it approved ordinance 54-100L to deny sewer service. (App.G, p.40). Comparing Appendix D5 to

D6 will show Council removed a reference to a wetland lot (Schedule attached to resolution for public auction) in an attempt to commit another fraud in 1990. Consistent with this, Mr. Bell admits the Council concealed the grant condition to defraud the public in 1985, after gaining the bar of limitations. In June 1988, Mr. McKinnon (engineer) stated the Council refused to endorse a waiver since ***"the Township's policy,* at that point of time was, if the structure, in fact, was in the Wetlands, *it was denied"*** (App.J7,p.45 township minutes). The engineer recalls a Council policy to deny endorsements, which violates the civil rights of those affected. There was no mention of his bringing the condition to Mr. Bell's attention. Yet, three years later, Mr. Bell and the engineer would have you believe the Council was unaware of the grant condition, contrary to the evidence. He would also have you believe it was the engineer that brought it to his attention. Mr.Bell's statements supports the inference of a fraud by him and Rockaway. The court's failure to comprehend Mr. Bell's fraud on the state court led to res judicata, instead of rejecting that defense as frivolous in light of his fraud and the admission of a custom [24] to defraud the public. Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238, 245 (1943). The court's error also represents an improper application of law to facts. NLRB v. Frazier, 966 F.2d 812 (3d.Cir 1992).

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[24] "establish a policy or custom [by showing] a persistent and widespread practice. Moreover, actual or constructive knowledge of such customs must be attributed to the governing body of the municipality." Depew, 787 F.2d at 1499; see also Berlanti, 780 F.2d at 301.

Mr. Bell's fraud and the engineer's conduct supports the inference that they were concealing a Council policy of fraud and civil rights violations. A fraud that begins with EPA rendering numerous lots valueless, in terms of ratables. This led to a custom of selling these lots at public auction by concealing the grant condition in order to benefit from the sales proceeds. Council's denial of the endorsement that Mr. Bell referred to, was a way of running the statute of limitations to keep petitioner from appealing to state and federal agencies in order to prevent discovery of the fraud before the statute ran. This supports a fraudulent concealment theory by the Council. King & King Ent. v. Champlin. Pet. Co., 657 F.2d 1147, 1154 (10th.Cir.1981). This also explains why Mr. Bell concealed these facts by means of a fraud on the court and petitioner.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATE: 6 / 21 / 96

Nelson Fernandes